No. 46706-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ELIZABETH ROBBINS,

Respondent,

v.

SAMUEL VALDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR WAHKIAKUM COUNTY
THE HONORABLE MICHAEL SULLIVAN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

RULES AND REGULATIONS

I. INTRODUCTION

The husband raises only two challenges on appeal. First, he complains that the trial court erroneously valued property awarded to the wife. Second, he complains that the trial court abused its discretion by ordering him to pay an equalizing payment to the wife to effect an equal division of the community property. Neither of these challenges have any merit. The trial court's valuation of the property awarded to the wife was supported by substantial evidence. And the trial court's order rejecting the husband's invitation to award the wife different property in order to "minimize" the equalizing judgment was well within its broad discretion. This Court should affirm and award attorney fees and costs to the wife for having to respond to this frivolous appeal.

II. RESTATEMENT OF ISSUES

1. The parties agreed that the trial court could consider the tax assessed value of real property owned by the parties as evidence of its value. Prior to trial, the husband negotiated with the taxing authorities to value the property at $130,000, which was what the wife believed the property was worth. The only other evidence of the property's value was a 2010 earnest money agreement that had not been admitted at trial, under which third

parties agreed to purchase the property for $250,000. It was undisputed that the potential buyers intended to forfeit the agreement because the $250,000 purchase price was too high. Did the trial court abuse its discretion by valuing the property at $130,000, which was within the range of evidence presented, including evidence that the wife intended to re-write the earnest money agreement to avoid forfeiture and allow the potential buyers to purchase the property for $130,000?

2. The parties were married less than 10 years, and each entered and left the marriage with substantial separate property. The trial court equally divided the community property, which was comprised mainly of illiquid real property, plus an airplane, sailboat, gold and silver, and vehicles. Did the trial court abuse its discretion by ordering the husband to pay the wife an equalizing money judgment in order to effect its equal community property division?

III. RESTATEMENT OF FACTS

Respondent Elizabeth Robbins, now age 62, and appellant Samuel Valdez, now age 63, were married on June 22, 2002 and separated 10 years later in October 2012. (CP 5, 6, 11; RP 101) This

was the second marriage for both parties; each had children from their prior marriage. (*See* RP 102, 218; CP 67)

Both parties entered the marriage with separate property. (RP 102-105, 108-16) The wife owned more separate property than the husband. (*See* Finding of Fact (FF) 9, CP 108, *unchallenged*) When they met, the wife did not work outside the home, and was living off her separate property investment income. (RP 102) The husband, who previously worked as an ironworker, heavy equipment operator, and was skilled in construction, owned a marijuana grow operation and had just started a "dirt working" business called Site Service Associates ("SSA"). (RP 103-04)

After they married, the husband ceased his marijuana grow operation and made very little effort towards making SSA profitable. (RP 148, 336, 425) Instead, both parties focused their efforts toward joint projects. (*See e.g.,* RP 152-53, 160-61, 392-93) They accumulated significant community property that the trial court valued at $640,000. (*See* CP 147-48) The parties also occasionally contributed labor and funds to the other party's separate property. (*See e.g.,* RP 120, 121, 129-30)

Among other properties acquired during the marriage, the parties purchased a 5-acre parcel on Altoona Pillar Rock Road along

the Columbia River in the mid-2000's for between $35,000 and $40,000. (RP 161, 392-93) The parties improved the land by constructing a road and well, and making it "electrical ready." (RP 161, 393-94) This property is the subject of the husband's appeal.

In 2010, the parties entered into an agreement to sell the land to Tom and Maryanne Bruneau for $250,000. (RP 161, 394-95) The agreement was not admitted into evidence at trial, but the husband described it as an "earnest money agreement." (RP 394-95)[1] The sale of the property would not be deemed "completed" until the Bruneaus had paid either $115,000 or $135,000 of the contract price of $250,000. (*See* RP 239-40; *see also* Ex. 44; CP 37-38) According to the husband, the Bruneaus paid $1,000 per month in "rent" to keep the "earnest money agreement alive." (RP 394-95)

The parties learned that the Bruneaus could no longer afford to buy the property at the contract price of $250,000. (*See* RP 161-62) The wife agreed that the property was not worth $250,000, and understood that the Bruneaus intended to forfeit the agreement unless the purchase price was reduced. (RP 161-62) Both parties

[1] Although the agreement was never presented to the trial court, it had previously been filed as part of an unrelated motion. (*See* CP 37-38)

liked the Bruneaus, and hoped to keep the Bruneaus on the property. (RP 161, 396, 512) The wife testified that if she was awarded the property, she would rewrite the agreement to sell the property to the Bruneuas for $130,000 – its tax assessed value. (RP 161-62, 334)

After the parties separated, the husband had negotiated with the tax assessor's office to value the bare land at $130,000. (RP 450) The Bruneaus had improved the property by constructing a home and shop on the property. (RP 161) The assessor valued the Bruneaus' improvements to the land at $54,000. (Ex. 8)

On June 24, 2014, the parties appeared before Wahkiakum County Superior Court Judge Michael J. Sullivan for a three-day trial to dissolve their marriage. The parties agreed that the trial court could consider the tax assessed values for the parties' real property holdings as evidence of value. (RP 128, 288-89; CP 69)

Among the issues before the trial court was the value and distribution of the 5-acre property on Altoona Pillar Rock Road. The husband testified that he believed the property was worth $250,000. (RP 451) The husband's trial counsel, however, contradicted his testimony, asserting in closing that "all the parties agree that [the 5-acre parcel] is not worth what the contract

indicated the value was." (RP 512) The wife testified that the 5-acre property was worth $130,000 – its tax assessed value. (*See* RP 159, 161-62)

At the conclusion of trial, the trial court stated that "overall, [it] found [the wife's] testimony more credible than [the husband]'s" (FF 11, CP 108, *unchallenged*), and largely adopted the wife's tracing to characterize the property owned by the parties. (FF 9, 10, CP 108, *unchallenged*) The trial court compensated the community for any work performed on the parties' separate properties (*See* FF 12, CP 108, *unchallenged*), and rejected the husband's claims for any "additional award based on equity." (FF 6, CP 107, *unchallenged*)

The trial court valued the 5-acre parcel that is the subject of this appeal at $130,000, after finding that "[husband] obtained a revaluation to $130,000 as to the land and argued for the $130,000 value to be adopted by the court." (FF 17, CP 110) Although the trial court expressed concern that it could not order the wife to re-write the earnest money agreement for the Bruneaus at that value, the wife conceded that she would do so even without a court order. (*See* RP 503-04)

The trial court awarded each party their separate property. (CP 150-51) The trial court valued the community property at $640,000 and ordered that it be divided equally between the parties. (*See* CP 147-48) In order to effect its division of property, the trial court ordered the husband to pay the wife an equalizing judgment of $111,645:

		Husband	Wife
*1554 Altoona Pillar Rock	$ 130,000		$ 130,000
Tidelands	$ 6,100		$ 6,100
1767 State Route 4	$ 111,000	$ 111,000	
*1198 Altoona Pillar Rock	$ 110,100	$ 110,100	
Piper Super Cub	$ 85,000	$ 85,000	
Sailboat	$ 47,500	$ 47,500	
SSA Equipment	$ 50,000	$ 50,000	
Shop Tools	$ 20,000	$ 20,000	
Loan to Beth's Son	$ 26,000		$ 26,000
2004 Honda Civic	$ 2,946		$ 2,946
GMC Truck	$ 8,535	$ 8,535	
611 32nd Ave., Longview	$ 7,000		$ 7,000
Menlo, WA	$ 6,800		$ 6,800
Hama Hama Cabin	$ 30,000		$ 30,000
Sub total	$ 640,981	$ 432,135	$ 208,846
Equalizing judgment		($ 111,645)	$ 111,645
TOTAL	$ 640,981	$ 320,490	$ 320,491

*valued at its tax assessed value

(CP 147-48)

The husband appeals. (CP 135-51)

IV. ARGUMENT

A. The trial court's valuation of the 5-acre parcel awarded to the wife was supported by substantial evidence.

The trial court properly valued the 5-acre parcel awarded to the wife at $130,000. A trial court has authority to assign values to property so long as it is within the range of evidence. *See Marriage of Soriano*, 31 Wn. App 432, 435, 643 P.2d 450 (1982). In determining whether substantial evidence exists to support a court's finding of fact on the value of an asset, "the record is reviewed in the light most favorable to the party in whose favor the findings were entered." *Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997). "Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

Here, there was substantial evidence to support the trial court's finding that the 5-acre parcel was worth $130,000. The parties stipulated to the trial court's consideration of tax assessed values to determine the value of real properties. (*See* CP 69; RP 128, 288-89) In fact, another property on Altoona Pillar Rock Road awarded to the husband was also based on its tax assessed value.

(*See* FF 5, CP 107; Ex. 45) The wife also testified that she believed the property was worth $130,000, conceding that she would re-write the earnest money agreement with the potential buyers using that value as its purchase price. (RP 162) *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478, 481 (1968) ("An owner may testify as to the value of his property and the weight to be given to it is left to the trier of fact."). That the husband specifically negotiated with the tax assessor to value the property at $130,000 is further evidence of its value. (*See* RP 396)

The husband argues that the trial court should have used the $250,000 purchase price established in the parties' earnest money agreement as the property's value. (*See* App. Br. 9) But "it does not matter that other evidence may contradict" the value established by the trial court, as "credibility determinations are left to the trier of fact and are not subject to review." *Burrill*, 113 Wn. App. at 868. In this case, the trial court clearly found the wife's testimony that the property was not worth $250,000 more credible than the husband. (*See* FF 11, CP 108)

On appeal, and for the first time, the husband also argues that the community asset was the "purchase and sale agreement," and not the land itself. (App. Br. 8-9) This Court should reject this

belated argument because the husband never raised it below. Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to give the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

Below, the husband never claimed that the parties' only interest in the 5-acre parcel was the earnest money agreement, and not in the land itself. Nor could he. The husband never even presented a copy of the earnest money agreement to the trial court, and acknowledged that he was not certain of its terms. (RP 450) Further, throughout trial, the husband argued that he should be awarded the real property itself – not the earnest money agreement. (*See e.g.*, RP 451, 512; CP 96) Therefore, even if the trial court erred in treating the parties' interest in the 5-acre parcel as the land and not the agreement, the husband invited that error

and cannot complain about it on appeal. *Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Even if the parties' only interest in the property was in the earnest money agreement, the trial court properly valued that interest at $130,000. It was undisputed that the potential buyers intended to forfeit the agreement, which would result either in the property being returned to the parties at its current tax assessed value of $130,000 or a renegotiation of the earnest money agreement, in which case the wife testified that she would re-write the agreement to change the purchase price to $130,000. (RP 161-62) The trial court's valuation of the parties' interest in this property was supported by substantial evidence, and this Court should affirm.

B. It was within the trial court's discretion to effect its equal property division by ordering the husband to pay the wife a money judgment.

The husband does not complain that the trial court's equal division of the community property was an abuse of discretion. Instead, he complains that the trial court should have awarded different property to the wife to minimize the equalizing judgment. (App. Br. 9-13) But a trial court has "broad discretion" in dividing property, as "it is in the best position to determine what is fair, just,

and equitable." *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). "Appellate courts should not encourage appeals by tinkering with [marital dissolution decisions]." *Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). "The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court." *Landry*, 103 Wn.2d at 809. As a consequence, "trial court decisions in marital dissolution proceedings are rarely changed on appeal." *Marriage of Buchanan*, 150 Wn. App. 730, 735, ¶ 7, 207 P.3d 478 (2009) (citations omitted).

It is not this Court's function to modify the trial court's decision and grant the husband the specific relief he demands, which would be to award the wife different property "to minimize the offset payment." (App. Br. 12) Even if this Court "might have reached a different conclusion if it had been charged initially with the responsibility" of deciding the matter, it will not reverse unless the trial court "manifestly abuses its discretion." *Kehus v. Euteneier*, 59 Wn.2d 188, 193, 367 P.2d 27 (1961). To prove a manifest abuse of discretion, the appellant must show that the trial

court's decision is manifestly unreasonable, meaning that its decision is outside the range of acceptable choices, or is based upon untenable grounds. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The husband cannot meet his "heavy burden" to prove an abuse of discretion, *Landry*, 103 Wn.2d at 809, and instead claims that the "error in this case is that the judge never considered the overall distribution." (App. Br. 11) But the trial court did consider the overall distribution and found that "the distribution of property and liabilities as set forth in the decree is fair and equitable." (FF 3.4, CP 123) Awarding the wife a judgment to effect an equal division of the community property was well within the trial court's discretion in making a just and equitable division of property and wholly appropriate.

There is no "patent disparity" in dividing the parties' community property equally (App. Br. 11), even if it does require the husband to pay a judgment to the wife. *See e.g. Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002) (affirming an equalizing judgment of $240,000); *Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45 (2013) (affirming an equalizing judgment of $1.7 million), *rev. denied*, 180 Wn.2d 1016 (2014); *Marriage of*

Larson/Calhoun, 178 Wn. App. 133, 313 P.3d 1228 (2013) (affirming an equalizing judgment of $27 million), *rev. denied*, 180 Wn.2d 1011 (2014). The trial court properly declined the husband's invitation to award the wife certain unimproved real property (the "SR4" property), when only the husband had the ability and equipment to develop the property. (RP 469) Nor was the trial court required to award the wife an airplane that the husband historically had flown as part of her share of the property division. (RP 133) Because the trial court's property division was within its discretion, this Court should affirm.

C. This Court should award attorney fees to the wife for having to respond to this appeal.

This Court should award attorney fees to the wife for having to respond to this appeal. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees), *rev. denied*, 100 Wn.2d 1023 (1983). The husband's appeal challenges fact-based, discretionary decisions by the trial court that were made within its broad discretion and is supported by substantial evidence. The husband also raises a

challenge in this Court that he never raised below, and to the extent that there was any error related to this issue, he invited it. This Court should award attorney fees and costs to the wife.

V. CONCLUSION

The trial court's valuation of the parties' interest in the 5-acre property was supported by substantial evidence. Further, the trial court's division of the property, and awarding the wife an equalizing judgment was well within its broad discretion. This Court should affirm and award attorney fees and costs to the wife.

Dated this 22nd day of May, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 22, 2015, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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V Vigoren

Victoria K. Vigoren

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